Sent via e-mail
BDO@usbr.gov

Federico Barajas
U.S. Bureau of Reclamation
Bay-Delta Office
801 I Street, Ste. 140
Sacramento, CA 95814

RE: Public Comment on the BDCP Financing MOA

Dear Mr. Barajas,

Thank you for the opportunity to submit comments on the First Amendment to the Memorandum of Agreement Regarding Collaboration on the Planning, Preliminary Design and Environmental Compliance for the Delta Habitat Conservation and Conveyance Program in Connection with the Development of the BDCP (MOA). This letter addresses as well issues raised in the Federal White Paper on the 2011 BDCP MOA attached to the October 31, 2011 letter from Deputy Secretary David Hayes to U.S. Representative George Miller. We also concur in and support the comments submitted by our colleagues with the Natural Resources Defense Council and the Environmental Water Caucus.

As one of the signatories to the Planning Agreement Regarding the BDCP (Oct. 6, 2006)("Planning Agreement."), EDF has a strong interest and substantial investment in the development of a successful and credible Conservation Plan pursuant to the relevant state and federal endangered species statutes. These comments are submitted in furtherance of that goal.

Export Water Contractor Permittee Status

The MOA commits the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau)(together, Project Agencies) to listing the export water contractors as applicants and permittees for the incidental take permits based on the BDCP Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP). It also notes that, as required by law, the California Department of Fish and Game, the National Marine Fisheries

123 Mission Street
San Francisco, CA 9410
T 415 293 6050
F 415 293 6051
edf.org
New York, NY/ Austin, TX/ Bentonville, AR/ Boston, MA/ Boulder, CO/ Raleigh, NC
Sacramento, CA/ San Francisco, CA/ Washington, DC/ Beijing, China/ La Paz, Mexico

Service and the U.S. Fish and Wildlife Service (together, Fish Agencies) will decide whether to grant the permits. Section II(H).

EDF and other NGOs have previously detailed why it is inappropriate to list the export contractors as applicants and permittees for purposes of the incidental take permit at issue. *See* Memorandum to Jerry Meral and David Nawi regarding Permittee Status (March 23, 2011) attached and incorporated herein by reference. We note that we have not received a response from the agencies addressing the issues or analysis raised in this Memorandum.

In brief, the BDCP is intended to be a Conservation Plan to provide the basis for the issuance of new federal and state incidental take authorizations for the coordinated operation of the Central Valley Project ("CVP") and the State Water Project ("SWP")(together, "Projects"). These Projects are owned and operated by the U.S. government and the State of California respectively which is why the existing Biological Opinions, authorizing take for the Projects, operate against actions taken exclusively by the U.S. Bureau of Reclamation and the California Department of Water Resources. At issue in both of the Biological Opinions is the impact of coordinated Project operations on the biological resources of the Bay Delta Estuary. The issuance of any of the new incidental take authorizations at issue will inherently revolve around the coordinated Project operations that gave rise to the jeopardy opinions. While the export water contractors are the ultimate beneficiaries of certain water deliveries from the Projects, it is the actions and decisions of the Bureau of Reclamation and the Department of Water Resources that are at issue in the Fish Agencies" determinations about whether or not incidental take may be authorized for the Projects' Delta operations.

The export water contractors neither own nor operate these Projects. They are not parties to the 2004 Long-Term CVP and SWP Operations Criteria Plan (OCAP), or the 1986 Coordinated Operating Agreement (COA). We appreciate that the MOU states that the export water contractors do not have any "authority over water project operational decisions," but due to the importance of this fundamental issue, more clarification is warranted. The MOU should ensure that the export water contractors have no authority or role beyond that of the general public in developing project operational parameters, developing or employing adaptive management limits of project operations, developing annual operations plans or any other activity that may present conflicts between water exports and ecosystem protection of Delta water quality. Furthermore, it is not appropriate for the contractors to be co-permittees with the Project Agencies, which would essentially put the contractors in the shoes of these agencies and elevate their interests above those of others with a stake in these massive public works projects.

Moreover, allowing the export water contractors to hold incidental take permits for the operation of federal and state water Projects that they neither own nor operate and for which they do not have primary responsibility is not only illogical and inappropriate, but legally improper. Federal guidelines provide that permittees must "be capable of overseeing HCP implementation and have the authority to regulate the activities covered by the permit." As non-owners or operators of the

Projects, the water contractors – properly – do not have authority with regard to (1) Project operations, (2) the Projects" water rights, or (3) obtaining a permit to change the point of diversion. These are central, if not the central, implementation activities at issue in the BDCP.

We respectfully disagree with the assertion in the Federal White Paper that there are precedents for granting contractors permittee status. The single such instance of which we are aware, and the only one noted in the White Paper, is the Lower Colorado River Multi-Species Conservation Plan (MSCP). This MSCP is not comparable or relevant to the Bay Delta Conservation Plan because it does not involve water project operations and contractors were granted permittee status only with regard to taking species associated with habitat restoration and management and fish stocking. Neither the Section 10 permit for the water agencies nor the Section 7 biological opinion for the Bureau of Reclamation covered water operations on the Lower Colorado River MSCP. Further issues and problems with extending this status to the contractors are outlined in the March 2011 memorandum attached.

Agency correspondence in response to congressional and stakeholder objections around this issue has been inconsistent. The agencies maintain, first, that such concerns are "misplaced" because permittee status confers limited benefits and not control of underlying activities. At the same time, the agencies justify various provisions in the MOA giving the contractors access to information and influence over the process (see below) on the basis of their decision to treat the export contractors as applicants ("HCPS/NCCPs are typically applicant driven.")

In our view, the law, regulations and precedents are clear; the appropriate applicant and permittee for an incidental take permit related to operations of the State Water Project is DWR, the sole owner and operator of the SWP and the only entity ultimately responsible for its operations. EDF also concurs with the Federal White Paper that the BDCP should reasonably serve as the basis for Section 7 reconsultation with regard to the Bureau of Reclamation"s CVP operations within the Delta. However, Section 7 involves the legal duties and obligations of federal agencies whose actions affect listed species, and should not be driven by the prerogatives of federal contractors.

We appreciate that the MOA contains savings language reflecting the legal reality that the Fish Agencies will ultimately make the decision about whether to "grant any permit." Sec. II(H). Nevertheless, in signing the MOA, the U.S. Department of the Interior and the California Department of Water Resources would appear to have committed themselves to the untenable position that the export water contractors should be accorded legal status to hold incidental take permits alongside the Project agencies for the coordinated operations of the Projects. The Fish Agencies are obviously sub-agencies of, or sister agencies to, the agencies that by virtue of signing the MOA have pre-committed themselves to this position. While the Fish Agencies have the technical authority to reach a different conclusion, their ability to do so would appear to be compromised by the commitments made in the MOA.

Finally, EDF concurs that the export contractors have an essential role to play in working with the agencies and other stakeholders in developing the BDCP and in implementing key aspects of the Conservation Plan. However, this role does not require that these contractors be afforded co-equal permittee status with the state and federal agencies. This is an unnecessary over-reach that jeopardizes the likely success of the BDCP process rather than supporting it.

RECOMMENDATION: Eliminate Sec. II(H).

Federal Contractor Assurances

As drafted, the MOA provides that it is an "essential element of a successful BDCP" to provide one set of stakeholders, the CVP export water contractors, with "the greatest measure of certainty" equivalent to ESA Section 10 „no surprises" assurances. Section II(J). The MOA goes on to commit the federal and state governments to an expeditious process for evaluating such measures. EDF objects to this provision on several grounds.

First, the BDCP has yet to grapple seriously with its primary objective – the establishment of a credible Conservation Strategy that will make a sufficiently meaningful contribution to the recovery of 63 Covered Species to support incidental take permits for Project operations in the Delta. EDF, NGO and National Academy of Sciences concerns regarding science, analysis, technical review, the range of alternatives, goals and objectives and the overall efficacy of the draft BDCP are detailed elsewhere. Until the federal and state agencies produce a credible Conservation Plan, driven by quantified goals and objectives, and committed to achieving those goals and objectives, it is premature to focus limited resources on measures to provide the Projects, or their contractors, with assurances limiting ESA and CESA liability.

Second, Sec. II(J) violates the principle that assurances regarding Project operations must be commensurate with assurances of biological performance. Issuance of an incidental take permit turns on the extent to which the HCP/NCCP is reasonably likely to contribute substantially to recovery of the covered species. It is inappropriate for the agencies to commit to assurances of regulatory relief while making no concomitant commitment to biological performance. EDF respectfully disagrees that pledges from the agencies that they intend to comply with legal requirements constitute a sufficient balance for a written agreement, signed by agency heads, that commits those agencies to one set of assurances for one set of parties while remaining silent on assurances for the ecosystem.

Third, as the Federal White Paper acknowledges, Federal agency actions do not qualify for Section 10 „no surprises" assurances. As established above, the federal subject of the potential incidental take permit is the operation of the CVP, a water project owned and operated by the U.S. government. We concur that the BDCP should be able to serve as both a Section 10 program for the SWP and as a sound basis for ESA Section 7 consultation for the CVP. *See*

Federal White Paper at 3. However, this does not require providing Section 10 assurances to federal export water contractors.

The reason that such assurances are not provided to Federal agencies is that they have a higher and ongoing duty of care to listed species than non-federal entities. *See*, 50 CFR Sec. 17.22(b)(5) (stating that no surprises assurances "cannot be provided to Federal agencies.") This rule was promulgated specifically to clarify that „no surprises" assurances "do not apply to Federal agencies who have a continuing obligation to contribute to the conservation of threatened and endangered species under section 7(a)(1) of the ESA." 63 Fed. Reg. 8867 (Feb. 23, 1998). NMFS and FWS cannot be precluded from imposing additional terms or conditions on a federal agency as needed to minimize or mitigate harm to listed species as needed. Thus, „no surprises" guarantees cannot be extended with regard to the operations of a federal water project – or the deliveries of water from that project – under the control of the federal government.

Fourth, by identifying assurances for the export water contractor assurances as an explicit federal priority, the MOA opens the door to assertions that agency discretion must be exercised in the contractors" favor with regard to a wide range of decisions and determinations going forward. The provision could be read to suggest that agency action regarding Project operations, as well as a host of other issues, must maximize certainty for federal export water contractors over other considerations. This is inappropriate and improper in light of the CVP"s authorizing statute which requires Interior to operate the CVP for the purposes of fishery restoration, protection and enhancement on par with obligations to deliver water for consumptive purposes. At the least, Sec. II(J) invites further challenges to agency actions that benefit fish and wildlife if such actions could be construed to conflict with the goal of maximizing contractor "certainty." The federal export water contractors in particular have made clear their enthusiasm for litigation to enforce perceived, if not actual, entitlements.

We are also concerned that this explicit federal priority to maximize the delivery of water to south-of-Delta contractors might impair other CVP environmental obligations, including but not limited to the Trinity River Program, the San Joaquin River Restoration, and managed wetlands.

EDF respectfully disagrees that these issues are addressed or mitigated by the inclusion of generic "to the extent provided by law" language. It is assumed that agencies do not intend to violate laws. More critically, this phrase does not represent a limitation on the agencies" obligation, but rather a commitment that the agencies will go to the maximum lengths allowed to accommodate the contractors" "certainty" interest. The concern and the issue is how these agencies will use their discretion to make innumerable decisions, particularly those affecting Project operations and ecosystem recovery. MOA Section II(J) puts a thumb on the scale and represents an extraordinary agency commitment to elevate the parochial interests of one set of stakeholders over others, and over other key fish and wildlife protection and restoration considerations as well.

Finally, we recognize that the MOA does not state that the interests of the federal contractors are the only "essential element" of a successful BDCP. But in singling out one interest – and failing to identify any others – the agencies have placed unwarranted emphasis upon this issue and the interests of that one set of stakeholders.

RECOMMENDATION: Eliminate Sec. II(J)

Characterization of Peripheral Conveyance as a "Conservation Measure"

The MOA suggests that a Delta conveyance facility could be considered a "conservation measures." Recital R(c). This is incorrect as a matter of law and EDF opposes the agencies signing any document to this effect. Federal and state endangered species laws define conserve and conservation to mean "methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." A peripheral canal or tunnel is a water development project. It is intended to divert large amounts of water out of the ecosystem for purposes of export for consumptive use. Such a facility can under no reasonable definition be considered a "conservation measure."

If properly constrained and operated for ecosystem purposes, it appears to be possible that a northern diversion point could have a less deleterious effect on the Delta ecosystem than excessive pumping at the federal and state pumping stations in the south Delta, (although potential adverse environmental impacts associated with such diversions have yet to be assessed). Such operational constraints and parameters themselves may be reasonably considered to be mitigation measures addressing the adverse impacts of the Projects" diversion of freshwater from the Estuary.

RECOMMENDATION: Eliminate this reference.

Assurance Parity Issues

The Federal White Paper and related correspondence states that because the BDCP Conservation elements are still under development, "the form and scope of any assurances granted under the BDCP have yet to be developed." Similarly, in response to Congressional inquiry about the status of measurable benefits for salmon and the estuary, the agencies state that: "The Department of Interior is not in a position to answer this question at this time," and indicate that answers will depend on "the projected operation of the additional facility and what is determined by the applicable effects analysis." Joint Agency Response at 5.

The BDCP"s incomplete status has not prevented the agencies from proceeding with development of regulatory relief assurances for the export water contractors (see above). The agencies have also indicated their support for the construction of major new water conveyance, which will substantially alter flows within the Delta and present new risks of entrainment for

Sacramento River salmon, notwithstanding the unfinished status of the effects analysis and other elements of the BDCP. If sufficient information has been developed to initiate detailed discussions about conveyance and contractor assurances, it would appear time for the agencies similarly to develop ecosystem performance assurances.

> RECOMMENDATION: Initiate a process to develop meaningful and enforceable ecosystem performance assurances.

Financing and Affordability

The MOA provides that the contractors will "release" a financing plan for the "design, construction, operation, and maintenance" of any conveyance facility to be permitted as part of the BDCP. Sec. II(R). This provision is unclear and raises several concerns. While the MOA provides that the contractors must "coordinate" with the Bureau and DWR, Section II(R) suggests that these agencies are delegating to the export contractors primary responsibility for developing and preparing the conveyance financing plan. If this is the intent, the provision is inappropriate. These costs are intimately tied to assumptions about the design and operational elements of a facility. These are not issues properly delegated to the contractors. Whether a canal or tunnel, the peripheral conveyance will be a major public works project and the financial analysis, as well as questions of affordability and the relationship of the cost of the project to viable alternatives, are critical questions that the lead agencies must assess in order to ensure that reasonable and viable alternatives and potential impacts are fully considered.

Many critics are unconvinced by representations that the conveyance facility will cost only $12-$13 billion (*see* evolution of high speed rail cost estimates), and are equally skeptical that agricultural water interests, and some urban water users, will be able or willing to pay the full price for the water this facility will deliver. EDF and others have called for the BDCP agencies to address cost and financing for several years with limited success. It is concerning that this set of issues could be handed off to the export contractors with no obligation to conduct the work in public view until quite late in the process, the issuance of the draft EIS/EIR. State law requires the State Water Resources Development System to be operated as one project "for the benefit of all people of the state" and authorizes DWR to sell bonds for the construction of units of the system and to repay those bonds through contracts for water and power.

The agencies" response to Congressional inquiries notes that the California State Treasurer has been asked to examine the ability of the water contractors to pay for conveyance and mitigation costs. Joint Agency Response at 5. It would seem that this report is vital to the BDCP since cost and affordability directly impact the feasibility of „alternatives to take", as well as alternatives to the proposed project for purposes of the EIS/EIR analysis.

Finally, the agencies" response to Congressional queries regarding BDCP financing states that even without committed funding for the ecosystem program "it is reasonable to expect that, over

the fifty-year life of the permit, public funding will become available." Joint Agency Response at 6. We concur that funding for Delta-related ecosystem projects has been forthcoming over the last twenty years. However, we respectfully disagree with the assumptions in the agency response in three respects.

First, if we have correctly understood the agencies, the notion inherent in the response is that legal and ecological requirements can be satisfied if they are amortized over the 50-year life of the permit. The species and estuary at risk represent critical public resources that, as has been well documented, are on the brink of extinction today. Incidental take permits for Project operations and new conveyance cannot be issued on the premise that the ecosystem efforts can be delayed until funding becomes available, so long as it becomes available within 50 years.

Second, past funding success may no longer be a reasonable indication of future funding potential. Many have observed that government at all levels is entering a new era of limited resources for even the most critical services that may extend for decades to come.

Third, the BDCP needs to grapple with the possibility that anticipated public funding may not be available, or may not be available at the appropriate times in the necessary amounts. It is essential that these contingencies be addressed, particularly as they affect the financing plan for conveyance and the BDCP overall.

RECOMMENDATIONS:

- Revise the MOA to establish a date for the receipt of the Treasurer"s report, and require its inclusion into the BDCP analysis.
- Revise II(R) to provide that the financing plan will be developed in an open process including interested stakeholders and independent economic review of cost and affordability data and analysis.
- Revise II(R) to provide that the issue of what constitutes "mitigation" costs, as opposed to costs of the restoration program, will be determined by an independent panel.
- Revise II(R) to require that any financing plan must provide that the contractors are required to bear some portion of the cost of restoration program financing, including a schedule for the delivery of funds, in the event that public funding is not available in the short or long term.

Purpose of BDCP and EIS/EIR

Recital R merges the HCP/NCCP planning and EIS/EIR processes. EDF has concerns about this legally and practically. Consideration of „alternatives to take" is a fundamentally different exercise than consideration of project alternatives pursuant to NEPA and CEQA. Efforts to ensure a credible BDCP, and one that complies with the 2009 Delta Reform Legislation, by considering an appropriate range of alternatives including higher flow alternatives, have not yet

met with success. Recital R also appears to refocus the BDCP from its original planning goals (Recital H) to a set of objectives more in line with the economic interests of the export water contractors.

Surprisingly, the MOA does not reference the 2009 Bay Delta Reform legislation which set forth a number of legislative directives for the BDCP essential to its success and ability to be incorporated into the Delta Stewardship Council"s Delta Plan, most critically the fact that it is now California state policy to reduce reliance on the Delta for consumptive water supply.

The MOA also selectively "recites" the existence of various documents while ignoring others. For example, the recitals list a Schwarzenegger Administration letter regarding conveyance, but fail to list the NGO letter issued in connection with the 2010 transition documents detailing that those documents do not reflect a Steering Committee position. Similarly, the recitals fail to list the May 2011 National Academy of Sciences report indicating that the BDCP"s foundational work – the draft Conservation Plan – was fundamentally flawed. Highlighting certain documents in the MOA recitals signals that they have a different stature and status than those excluded. Agency approval of this type of selective elevation of certain documents produced in connection with the process is inappropriate.

RECOMMENDATIONS:

- Eliminate Recital R
- Eliminate references to selected documents and letters in connection with the BDCP with the exception of the Planning Agreement and other formal Steering Committee products.

Schedule Issues

The MOU commits the agencies to an "aggressive" schedule because the agencies believe it is important to move the BDCP forward as quickly as possible. There has been considerable discussion about whether the work needed to be done can reasonably be accomplished in the time available under the schedule. We appreciate Deputy Secretary Hayes" statement that the schedule "will not compromise our ability to produce a plan based on scientifically sound and legally defensible analyses." EDF notes that the NGO community has for many years, and in many letters, urged the agencies to use their time and resources more prudently, and it is clear that had those running the BDCP adhered to our recommendations regarding scientific process, goals, objectives, definition of alternatives, etc., the BDCP would have been substantially farther down the road than it is today.

Our concern is not with the timeline per se, but with the possibility that the schedule will undermine the science, alternatives and other analysis necessary to ensure a successful BDCP. The failure to do things correctly in the past cannot be the excuse to continue to fail to do so into the future. We do not seek perfection. But given the enormous stakes involved in the issuance

of 50-year incidental take permits, covering 63 species, the viability of most of California"s commercial salmon runs, and the very substantial environmental consequences associated with building new water conveyance (even a 3,000 cuffs facility would be quite considerable), EDF believes that it is essential that the agencies conduct the foundational work necessary to establish that the Conservation Strategy they intend to approve will in fact provide substantial contribution to recovery for those species and the Bay Delta ecosystem.

The MOA does not reflect the balanced approach with regard to the schedule outlined in the Deputy Secretary"s letter to Representative Miller. Taken together the schedule-related provisions indicate that meeting the schedule is the single most important driver in the BDCP process. For example, Section II(E) provides that DWR and the Bureau may proceed without Fish Agency input if not received in conformance with the schedule which establishes limited windows for comment on documents and analyses that are highly technical, complex and of considerable significance. Similarly, Section II(L) establishes conformance with schedule as a special priority. It contains no mention of the need to conform the schedule to accommodate appropriate review and analysis or development of alternatives if more time is needed to conduct these tasks than anticipated.

> RECOMMENDATION: Revise Sections II(C), II(D) and the other MOA provisions listed above to establish that the schedule is not paramount to other key considerations, and that the schedule cannot be used as a reason for failing to do science, analysis or development or consideration of alternatives reasonably needed to ensure that the BDCP results in an appropriate contribution to recovery of the covered species.

Export Water Contractors Influence Over BDCP Planning and Science

The MOA has drawn considerable heat over provisions that appear to provide the export water contractors with outsize access to information and opportunities to influence the BDCP planning process, the EIS/EIR development, and the science to support both. Unfortunately, the responses provided to Congressional queries, as well as the Federal White Paper, do not satisfactorily address these concerns.

EDF concurs with the White Paper"s observation that the MOA does not alter the legal responsibilities of the state or federal lead agencies under NEPA, CEQA or the relevant endangered species statutes. This observation, however, is non-responsive to the issues raised. The fact that these agencies will make the final decisions does not alleviate legitimate concern that the MOA provides export water contractors with an inappropriate level of influence over the BDCP planning, analysis, science and environmental review, and the extent to which such influence could affect the substance of those final agency decisions. Nor is it responsive to note that the public will have opportunity to comment at the draft EIS/EIR stage. Providing comments on an EIS/EIR is not reasonably comparable to the opportunities to influence analysis,

decisions and outcomes the MOA affords the export contractors throughout the drafting and analytical process leading up to the draft EIS/EIR.

The MOA provides the export contractors with substantial opportunities to shape the approach and analytic framework adopted by the consultants preparing the Effects Analysis and the selection and review of potential alternatives. These opportunities include but are not limited to:

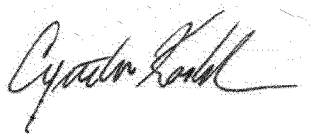
- Authorization to serve as contract administrator for the BDCP consultants. Section II(G)
- Early access to all non-public consultant work product and project management documents, including but not limited to draft task orders, preliminary engineering, and draft Notice To Proceed Agreements. Sections II(K), III(C)
- Monthly meetings with the agencies re BDCP and EIS/EIR progress. Section II(L)
- Right to consultation with DWR and Bureau if it appears to any export contractor that any task may not be adhering to the schedule. Section II(L)
- Right to terminate funding agreement any time export contractors" demands regarding task completion and schedule are not adhered to. Section II(L)
- Ability to serve as co-drafters of responses to comments on the BDCP and EIR/EIS submitted by any other parties. Section II(K)
- Special access to the Program Manager. Sections II(L), (M)

RECOMMENDATIONS:

- Revise the provisions identified above to clarify that the export contractors shall not have any greater access to information or drafts or meetings with agency staff than any other member of the Steering Committee or other key stakeholders. At the very least, their access to information, documents and agency personnel should be no greater than that of other Responsible or Cooperating Agencies, such as the Fish Agencies or Delta Counties.
- Eliminate provisions allowing contractors to prepare comments, manage consultants, and tasks.
- Limit the export contractors" ability to withdraw funding to only those circumstances where the agencies are violating law, and include provisions that withdrawal of plan funding for reasons other than violations of law terminate the exporters" opportunity to receive no surprises assurances.

Thank you again for the opportunity to provide these comments. We look forward to a continued constructive collaboration with the state and federal agencies.

Sincerely,



Cynthia Koehler
California Water Legislative Director

Spreck Rosekrans
Economic Analyst

cc: Dr. Gerald Meral